1983

Mrs. Herman Foster And John Ewing, Natural Parents of Jeffrey Adrian Ewing, aka Jeffrey Ewing Foster, Deceased, A Minor, And David Mac Kelly v. Salt Lake County, A Body Corporate And Politic of the State of Utah : Brief of Respondents-Cross Appellants

IN THE SUPREME COURT

OF THE

STATE OF UTAH

MRS. HERMAN FOSTER and JOHN EWING, natural parents of Jeffrey Adrian Ewing, aka Jeffrey Ewing Foster, Deceased, a minor, and DAVID MAC KELLY,	:	
Plaintiffs-Respondents-Cross Appellants,	:	No. 19051
-vs-	:	
SALT LAKE COUNTY, a body corporate and politic of the State of Utah,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENTS-CROSS APPELLANTS

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF SALT LAKE COUNTY
HONORABLE DAVID B. DEE, JUDGE

KIPP AND CHRISTIAN
Carman E. Kipp
Stephen F. Hutchinson
600 Commercial Club Building
Salt Lake City, Utah 84111
Attorney for Respondents

TED CANNON
SALT LAKE COUNTY ATTORNEY
Ralph D. Crockett
Deputy County Attorney
231 East 400 South
Salt Lake City, Utah 84111
Attorneys for Appellant

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SALT LAKE COUNTY ATTORNEY
Ralph D. Crockett
Deputy County Attorney
231 East 400 South
Salt Lake City, Utah 84111
Attorneys for Appellant

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IN THE SUPREME COURT

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BRIEF OF RESPONDENTS-CROSS APPELLANTS

NATURE OF THE CASE

This is an action in contract based upon a Certificate of Self-Insurance, and plaintiffs' claim of recovery in this case is based upon the theory that a policy of self-insurance must provide liability insurance coverage for permissive users of vehicles in the State of Utah, and that Salt Lake County is the [illegible] liability insurance carrier for David Mac Kelly.

DISPOSITION IN THE LOWER COURT

The trial court held that the defendant was indebted plaintiffs in the amount of $15,000 plus costs, attorney's f and accrued interest on $150,000.00.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment entered by trial court. Cross Appellant seeks modification of the Judgm insofar as it limits the financial responsibility of Salt L County to the sum of $15,000.00.

STATEMENT OF THE FACTS

On or about July 26, 1978, Jeffrey Adrian Ewing, Jeffrey Ewing Foster, the deceased son of Mrs. Herman Foster Mr. John Ewing, was killed as a result of a motor vehicle/ped trian accident which occurred at approximately 3900 South and East in Salt Lake County, Utah. That accident involved decea and an employee of Salt Lake County, David Mac Kelly. Mr. K was employed as a deputy sheriff and was at the time of accident, driving a sheriff's motor vehicle owned by Salt

County, issued to Kelly incident to his employment as a deputy sheriff and furnished to him on a 24-hour per day, 7-day per week basis. David Mac Kelly, while operating the sheriff's motor vehicle, at approximately the intersection of 3900 South and 900 East, at about 11:00 o'clock in the evening, struck Jeffrey Adrian Ewing and killed the young boy.

On or about March 9, 1978, Kelly was served as a defendant in an action brought by Mrs. Herman Foster and Mr. John Ewing for the wrongful death of their son. Kelly contacted Farmers Insurance Group (hereinafter referred to as "Farmers"), the insurance carrier on his personal vehicle which had not been involved in the accident, and on or about March 15, 1978, Farmers sent a letter demanding that the County defend Mr. Kelly as self-insurer of the County motor vehicle involved in the accident. (R. pg. 39).

In a letter dated March 23, 1978, the Salt Lake County Attorney's Office refused to defend or otherwise become responsible for Mr. Kelly in the pending action and declined the defense which had been tendered. (R. pg. 93) On July 27, 1978, W. Brent Wilcox, acting as independent counsel for David Mac Kelly, again tendered the defense to Salt Lake County, but no response was ever received to that tender. (R. pg. 40)

Salt Lake County denied that it had an automo liability policy covering David Mac Kelly and refused to de him in the civil action or to pay any judgment rendered aga him therein, and Farmers was forced to represent David Mac Ke under a reservation of rights asserting that Salt Lake County a self-insurer had a primary duty to defend Mr. Kelly.

Prior to July 1, 1977, Salt Lake County's motor ve les had been insured by commercial insurance companies, the m recent of which was the Gulf Insurance Company (hereinaf referred to as "Gulf"), which had provided Salt Lake County wi both no-fault insurance coverage and comprehensive automob liability insurance coverage. (R. pg. 117) The no-fault li of liability were dictated by statute and the limits of liabil of the Gulf comprehensive policy were $100,000.00 per person $300,000.00 per occurrence for bodily injury and $50,000.00 each occurrence for property damage.

On or about July 13, 1977, the Salt Lake County Com sion voted to investigate a self-insurance program. (Plaintif Exhibit No. 7) On June 27, 1977, Salt Lake County applied to Insurance Commissioner for a Certificate of Self-Insurance approved an annual levy of approximately $500,000.00 to pro security to pay outstanding judgment debts. (R. pg. 138) Salt Lake County relied on its powers under Utah Code Annot

section 17-15-13 (1953) to levy an unlimited assessment to pay any judgment incurred. Salt Lake County intended to provide security by obtaining money from the general public through an annual levy and/or an unlimited assessment for the purpose of paying outstanding judgments.

On or about June 30, 1977, the Salt Lake County Commission decided to reject Gulf's bid to provide commercial insurance for a premium in the sum of $475,000.00, which resulted in further savings for the County and the Insurance Commissioner approved Salt Lake County's application for a Certificate of Insurance. The Certificate of Insurance was issued on July 7, 1977, (R. pg. 137; Exhibit No. 3) and the commercial insurance was discontinued with Salt Lake County relying on funds obtained from the general public for the purpose of paying any judgments rendered against it which would otherwise have been paid by comprehensive automobile liability insurance coverage.

David Mac Kelly thus found himself in the position of defendant in a criminal action prosecuted by the County of Salt Lake as well as defendant in a civil action for wrongful death, praying for damages in the amount of $1,250,000.00. The nature of the accident, the circumstances of the father, John Ewing, and the mother, Mrs. Herman Foster, including their medical problems, warranted concern on the part of Kelly that a trial to a jury

would have deep emotional impact and probably result in a l
plaintiff's verdict.

Salt Lake County had declined to defend Kelly in
lawsuit or to pay any judgments that might be rendered agai
him and in an effort to pursue all reasonable means of avoi
personal liability, on or about December 12, 1978, Kelly ente
into an agreement with Mrs. Herman Foster and John Ewing, pare
and natural guardians of Jeffrey Adrian Ewing, wherein the par
ies agreed that the plaintiffs would schedule a non-jury tr
and that David Mac Kelly would submit without futher contest
issue of negligence and liability upon the depositions taken
the case and upon the testimony of any other witnesses called
the plaintiffs.

It was determined that if the Court found liabil
against Kelly for negligence, the amount of damages would
determined by the Court upon additional proof to be offered
the plaintiffs. The plaintiffs agreed under certain circ
stances, not to proceed against any of the personal assets
Kelly other than the rights which Kelly had against Salt L
County or any other insurers affording liability coverage.
pg. 12) (T 78-1377 - p.4. Exh. No. 14) At all times mater
herein, Salt Lake County was represented by counsel, who not

voluntarily withdrew from the case, but refused to defend or assist David Mac Kelly.

On January 4, 1979, by order of the Court and with consent of all parties, Salt Lake County, Delmar L. Larsen and Rex L. Vance were voluntarily dismissed from the wrongful death action. On July 5, 1979, the wrongful death action by plaintiffs against Kelly was tried before the Honorable Judge David K. Winder. The Judge was fully advised about, and given copies of the Stipulation for Dismissal Without Prejudice as to defendants Larsen, Vance and Salt Lake County, and the stipulation entered into between the plaintiffs and Kelly.

The depositions of Utah Highway Patrolman, D. N. Tinning, independent witness, Dale V. Leany, defendant Kelly, Sheriff Larsen, and Sheriff Vance, were published and considered by the Court in determining the issue of liability. In all the depositions referred to above, with the exception of the deposition of Highway Patrolman Tinning, counsel for Kelly appeared and actively cross-examined the witnesses. Various counsel for Mr. Kelly were properly notified and advised of the deposition of Patrolman Tinning but failed to appear. Documentary evidence was introduced and considered by the Court; Frank E. Stewart, a public accountant and financial consultant, Mrs. Herman Foster and Dr. John Ewing, each personally testified at the trial.

Judge David K. Winder ruled that Mr. Kelly, w operating the motor vehicle assigned to him and owned by S Lake County, was negligent and his negligence caused an auto bile/pedestrian accident which resulted in the death of Jeff Adrian Ewing. A judgment was awarded against Kelly in the sum $150,000.00.

On January 30, 1979, the plaintiffs filed an act against Salt Lake County, claiming that Salt Lake County was automobile liability insurer for Kelly and, as such, was indeb to the plaintiffs in the sum of $100,000.00, and for such oth and further relief as the Court deemed proper.

Thereafter the matter was heard by the Honorable Ju James S. Sawaya on a Motion for Summary Judgment, which Mot for Summary Judgment was granted by Judge Sawaya in favor plaintiffs and against defendant. The judgment was appealed the Supreme Court of the State of Utah and returned to the Di trict Court for trial. The trial was held on September 13, 19 before the Honorable David B. Dee, District Judge, without jury.

At trial, plaintiffs contended that the County appl for and received a Certificate of Self-Insurance from the Insurance Commissioner which Certificate of Self-Insurance wa

full force and effect at the time of the auto/pedestrian collision; that no written contract defining the terms of the self-insurance and no written intra-county communication defining the terms or limits of coverage had been prepared at any time prior to the auto/pedestrian collision; that under the terms of the prior commercial insurance contract and the standard terms of automobile liability insurance contracts, (Exhibit No. 4) liability coverage was extended to persons using County vehicles with the permission of the County. Plaintiffs also contended that at the time of the collision, under the facts of this case, David Mac Kelly was a permissive user of the County sheriff's vehicle in accordance with the standard insurance definition (Exhibit No. 4) and was, therefore, an insured under and covered by the Salt Lake County Self-Insurance Plan, just as if he had been an insured under a commercial insurance contract; that the absence of a restriction of or limit of indemnity coverage should be construed to mean full indemnification of an insured to the extent of his liability, which in this case is determined by a judgment against David Mac Kelly in the sum of $150,000.00, plus costs and interest to date; and that whether or not Kelly was within the course and scope of his employment with Salt Lake County at the time of the auto/pedestrian fatal collision, is irrelevant to a determination of the County's liability herein, but that in any event,

Kelly was acting within the course and scope of his employ with Salt Lake County at the time of said collision.

Judge Dee ruled (1) that Salt Lake County was a self insurer, (2) that Deputy Sheriff David Mac Kelly was a permissive user and an insured of Salt Lake County, (3) that Salt Lake County was obligated to provide indemnification to the extent of $15,000.00 pursuant to the Financial Responsibility Act, and that, accordingly, Salt Lake County was obligated to Respondent herein for indemnity in the sum of $15,000.00, for attorney fees and costs, and for interest on $150,000.00, plus costs until the payment of the indemnity limit of $15,000.00 is made.

ARGUMENT

POINT I

THE DISTRICT COURT IMPROPERLY LIMITED THE APPELLANT'S FINANCIAL RESPONSIBILITY TO THE SUM OF $15,000.00.

A. The benefits of the No-Fault Act and the minimum insurance coverage of the Safety Responsibility Act do not limit liability.

The trial court based its decision limiting Appellant's financial responsibility upon Allstate v. United States Fidelity & Guaranty, 619 P.2d 329 (Utah, 1980). In Allstate, this Court found that the No-Fault Act, U.C.A. §31-41-1, et seq. as amended

incorporated the security provisions of the Safety Responsibility Act, U.C.A. §41-12-1, et seq., (as amended) and that all insurance policies should be written to cover both provisions. Having found Appellant to be a self-insurer, the trial court interpreted Allstate to require that the minimum provided for in the Utah Financial Responsibility Act for bodily injury was also the limit of financial responsibility for Appellant.

Appellant contends that it is liable only for the payments described under U.C.A. §31-41-6, as amended, which are $1,000 funeral benefit and $2,000 survivor benefit. Appellant has made those payments to Respondents. The purpose of the no-fault statute is to allow for primary benefits to be paid by the insurer of a vehicle or by the owner of a vehicle. While not including all manner of loss, the no-fault statute recognizes certain losses and seeks to compensate for them. (See Belcher v. Aetna Casualty & Surety Co., 409 Mich. 231, 293 N.W. 2d 594 (1980)).

In Pascente v. Stoyle, 456 N.Y.S. 2d 633 (1982) the Court defined the purpose of the New York no-fault law as a means to provide for "immediate compensation so as to save accident victims from becoming destitute as a result of lost earnings or medical expenses." It was not the purpose of the act to take

away the common law right of an injured party. The Pasco court quoted a prior New York decision in it's reasoning:

> "The statute should be employed as a sword to gain immediate benefits for the injured not as a shield to minimize the insurer's potential damages." Yanis v. Texaco, 85 Misc. 2d 94, 97, 378 NYS 2d 570 (1975).

The Utah Code provides a cause of action for an inju resulting in death (U.C.A. §31-41-9). While this cause of acti may be within the scope of tort law, it is clear that the legi lature did not intend to limit the liability of an insurer to t minimum benefit provided for by the law.

The lower court correctly applied the principles s forth in Allstate insofar as U.C.A. §31-41-5(a) requires that insurance policy used for security to register and operate vehicle must include the minimum coverage provisions of t Safety Responsibility Act. The alternative to providing insurance policy under U.C.A. §31-41-5(a) is to provide equ alent security under U.C.A. §31-41-5(b). Appellant obtained a self-insurance certificate under the equivalent security pro sion of U.C.A. §31-41-5(b).

Appellant contends it is exempt from the provisions of the Utah Safety Responsibility Act by virtue of U.C.A. §41-12-33. The Utah Safety Responsibility Act prescribes the process of establishing proof of financial responsibility by insurance or bond. (Western Casualty Surety Co. v. Transamerica Insurance Co., 26 Ut.2d 50, 484 P.2d 1180 (1971)). Governmental entities are exempted from the Act because they are considered solvent and further, because they are an available source of indemnification. The exemption afforded to appellant under U.C.A. §41-12-33 exempts it only from having to prove a minimum level of financial responsibility in the event of an accident. However, as a self-insurer, Appellant must provide a security equivalent required by U.C.A. §31-41-5(a) equal to the minimum amount of coverage required in an insurance policy to quality as security under the No-Fault Act.

Neither the Utah No-Fault Act or the Utah Safety Responsibility Act seek to limit the amount of recovery by one who has been injured or to limit the amount of liability of an insured. The Acts merely provide a method of immediately securing payment for immediate (but not total) losses and provide for the means to post a security for those who own and/or operate a vehicle without the security required. (See Compensation Systems and Utah's No-Fault Statute, Robert E. Keeton, Utah L.R. 1973:

383; Ceilings, Costs and Compulsion In Auto Compensation Leg
tion, Walter J. Blum and Harry Kalven, Jr., Utah L.R. 1973;

B. A self-insurer has the obligations and duties o
insurer under U.C.A. §31-41-5(b).

1. Factual Background.

Prior to self-insuring, Appellant had liability in
ance coverage through a commercial carrier (Exhibit No. 6)
policy limits of $100,000.00 per person for bodily inju
caused by any permissive user of Appellant's vehicles. Su
quently, Appellant applied for and received a certificate
self-insurance. In its letter of application to the State In
ance Commission (Exhibit No. 17), Appellant stated its inten
to provide security "equivalent" to that for which Appellant
been paying a commercial carrier. Appellant did not set f
any limits of its liability in its application for self-in
ance. Accordingly, by its actions of allocating a reserve
possible judgments in an amount actually greater than the an
commercial premium for a $100,000 per person liability pol
and reserving the authority to further assess taxpayers as ne
sary to satisfy other judgments, Appellant created the legiti
and reasonable public expectation that it would pay judgment
the extent of at least $100,000.00.

2. Definition of self-insurer.

A self-insurer substitutes for an insurance policy the assurance that judgments against it will be paid. A self-insurer under the no-fault act who offers to provide indemnity equivalent to that formerly provided by a commercial carrier, must pay legitimate claims to the same extent as would have been paid by the commercial carrier.

Appellant cites several cases in support of its argument that due to the absence of an insurance contract, any statutes which regard contracts and indemnification by insurers do not apply to or bind Appellant.

In Southern Home Insurance Co. v. Burdette's Leasing, 234 S.W. 2d 870, (S.C., 1977), the Court states that (1) a self-insurer substitutes for an insurance policy to the extent of the statutory policy requirements; (2) Burdette, the self-insurer, self-insured the operation of its motor vehicles by persons using them with permission, expressed or implied; and (3) a self-insurer should provide the same protection to the public that a statutory liability policy provides since the purpose of public liability insurance is to protect innocent victims of motor vehicle accidents. (Citing Evans v. American Home Insurance, 252 S.C. 87, 166 S.E. 2d 811 (1969)).

Appellant relies on Glen Falls Insurance Co. v. Consolidated Freightways, 51 Cal.R. 789 (1966) for the proposition that a self-insurer is not an insurance carrier and is not obligated under any rules of extended policy situations such as permissive users. Contrary to Appellant's interpretation, the Court's holding actually supports Respondent's theory that the law must be liberally construed in order to give monetary protection to persons who are injured on the highway through the negligence of others. (See also Continental Casualty Company v. Phoenix Construction Company, 296 P.2d 801 (Cal., 1956)). In Guercio v. Hertz, 358 N.E. 2d 261 (New York, 1961), the Court found that self-insurance only relieved the self-insurer of the obligation to provide a specific policy for liability insurance.

Another case Appellant cites in support of its extended use theory is Western Pioneer Insurance v. Estate of Tait (September 29, 1982, CA Fifth App. Dist., California). The case was brought under the California Wrongful Death Statute by the insurance company of a passenger in a state owned vehicle who was killed while riding in the vehicle in the course of his employment. He and his driver, who was also killed had been driving. The widow of the passenger recovered from her husband's life insurance company, Western Pioneer. Western Pioneer then filed a declaratory relief action against the Estate of Tait

driver) and asked for indemnification of California's self-insurance. The California court overturned the lower court's decision for Western Pioneer using the reasoning in Metro U.S. Services, Inc. v. City of Los Angeles, 96 C.A. 3d 678, 158 Cal. R. 207 (1979). The Metro case was decided on the principal that the City as a self-insurer was not within the purview of the statute designed to settle disputes between insurance carriers regarding primary or secondary liability. Since Western Pioneer is an unreported case, respondent must assume that the Court in Western Pioneer used this logic in overturning Western Pioneer's attempt to have the State indemnify them because the Court could not settle disputes between primary and secondary insurance carriers.

The present case is distinguishable in that Respondent is seeking relief directly from the self-insurer who is the owner of the vehicle, the primary insurer, and there is no other collectible insurance.

3. The limit of Appellant's liability as a self-insurer is undefined.

One of the obligations of an insurer is to define the limit of his liability coverage. If there is no limitation or ceiling set forth, the limit of liability is presumed to be the

extent of the loss. (R. pg. 606, 607) Appellant neglected set forth limitations of its liability when it determined that would adopt a program of self-insurance. (Exhibit 7).

In Continental Casualty Co. v. Phoenix, 296 P.2d 6 (Cal., 1956), the Court found that the language of a financ responsibility statute could not be interpreted to limit insurer's liability to the stated minimum limits; rather it m be interpreted as providing full or maximum coverage. Liabil not clearly excluded from coverage is presumed to have be included (Topeka Railroad Equipment v. Formost, 5 Kans. App. 183, 614 P.2d 461, Kan., 1980).

Appellant set up a fund for self-insurance from lev and tax assessments. Appellant failed to notify its employ and agents, or the general public, of any reservations or sp ific limits to its liability. Having set up a fund from public coffers purportedly to protect its employees and memb of the public from loss, appellant now denies liability cover to those "beneficiaries" of the self-insurance program. App lant is attempting to save money at the expense of the pers for whose benefit the No-Fault and Safety Responsibility a were enacted.

As to Appellant's arguments that, because it is a se insurer and there is no policy contract to construe, ge

principles of insurance law are inapplicable to them, this Court stated in Foster v. Salt Lake County, 632 P.2d 810, at 815 (Utah, 1981) that:

> "To determine the scope of the [county's] self-insurance program, recourse must be had to Utah's insurance law and . . . to general legal principles relating to liability insurance and insurance carriers."

POINT II

THE JUDGMENT ENTERED BY THE DISTRICT COURT IS INADEQUATE ON THE BASIS OF THE EVIDENCE.

A. Appellant's self-insurance was equivalent to insurance coverage that provided for $100,000.00 for bodily injury.

Deputy Insurance Commissioner, Jeffrey Gabardi, testified that the State Insurance Commission would not have issued a certificate to Appellant if Appellant had not intended to keep the same liability coverage it had with their Gulf Insurance Policy (R. pg. 616). The basic criteria in allowing an entity to self-insure is that the entity is financially stable to the point of responding in the case of claims or judgments against them.

Self-Insurers must meet the same standards with res to furnishing coverage to insureds as do commercial carriers pg. 599). A self-insurer which does not meet those stand would not be certified by the State Insurance Commission 660). "If an entity or a person is going to become self-insu [the State Insurance Commission wants] them to respond in same manner as an insurance company." (Mr. Gabardi, R. 602). The public expects the same protection from a self-insu as a common carrier. Appellant did not notify the State Ins ance Commission that they intended to provide only the mini basic benefits provided for under the Utah No-Fault Act. If had, the State Insurance Commision would not have certif Appellant as a self-insurer. (R. pg. 602).

B. Appellant made no attempt to limit the use of the vehicle by David Mac Kelly.

As noted in the Statement of Facts, the County Sh iff's Department issued a patrol car to David Mac Kelly on a day week, 24-hour day basis. The purpose of this was to al Kelly to have the automobile to serve bench warrants after nor working hours and to have Kelly available for emergency duty.

The deposition of Sheriff Delmar L. Larson in Respondents', Ewing and Foster's, case against David Mac

was read into the record of the present case. (R. pg. 575) In it, Sheriff Larson testified that he knew of Kelly's drinking problem for one and one-half years prior to the accident. In that time, Sheriff Larson knew that Kelly had an accident in his own vehicle while driving under the influence of alcohol and had been issued a citation by the University of Utah Police for driving under the influence.

With that knowledge, Sheriff Larson, his superiors or Appellant did not attempt to restrict the use of their vehicle by Kelly except for a general rule that their employees not drive the vehicles assigned to them while under the influence. Appellant waived its right to deny coverage because it knew of the possible conditions under which its permissive user, Kelly, would improperly use the vehicle. "Waiver by an insurer is unilateral in that it arises out of either action or non-action of insurer or its duly authorized agents and rests upon circumstances indicating or inferring that relinquishment of a right was voluntarily intended by insurer with full knowledge of all facts pertaining thereto (Buchanan v. Switzerland General Insurance Co., 455 P.2d 344, (Wash., 1969)).

POINT III

APPELLANT IS BOUND BY THE JUDGMENT AGAINST KELLY.

A. Appellant was the indemnitor of David Mac Kelly.

The District Court found Kelly to be a beneficiary the self-insured Appellant and therefore Appellant is lawf required to provide indemnity in favor of David Mac Kelly in amount of $150,000.00.

Appellant contends the signed consent judgment agre ment between Ewing and Foster and Kelly released the Appell from their obligation to indemnify as the self-insurer of vehicle driven by Kelly, their permissive user.

A well-accepted and general rule is that where insurer received a notice of a suit and is allowed an opportun to defend but refused to do so, it is bound by the findings judgment, absent a showing of collusion or fraud. (McCarth Parks, 564 P.2d 1122, (Utah, 1977); East v. Fields, 259 P.2d (Wash., 1953); Warren Petroleum Corp. v. J. W. Green, 417 242 (5th Cir., 1969).

The defense of David Mac Kelly was twice tendere Appellant. Both times Appellant refused to defend Kelly.

Kelly, being abandoned by his primary insurer, agreed to a consent judgment in order to protect his assets with the understanding that he would seek indemnification of the judgment against him from Appellant.

Appellant argues that Kelly incurred no loss, therefore he is not entitled to their indemnification. In the case of Richichi v. City of Chicago, 49 Ill. App. 320, 199 N.E.2d 652, (1964), Richichi had a judgment against a police officer in the amount of $40,000.00 but he had collected only $1.01. Richichi filed suit against the City of Chicago and asked for indemnification. The Court held:

> "If it were held that the city would have to pay only such amount of the judgment as the policeman could afford to pay to the injured party, it would create a sequity of action and the purpose of the [indemnification] statute would be defeated."

Likewise, if Appellant is only to pay as much of the judgment as Kelly could afford to pay, it would defeat the purpose of the Certificate of Self-Insurance by which Appellant agreed to comply with the provions of the Utah No-Fault Act and

the Utah Safety Responsibility Act, the respondents would cor
ue to suffer the consequences of the wrongful death of t
child with no adequate compensation.

Appellant chose by failing to expressly state otherw
to have an unlimited liability under its self-insurance prog
and Respondents are entitled to recover the entire judgm
obtained against Kelly from Appellant.

B. The consent judgment was not collusive.

Appellant's arguments regarding collusion have no mer
in light of the fact that the agreement entered into betw
Respondents Ewing and Foster and Respondent Kelly was revie
and acknowledged by the Court. Appellant cites, Mustang Eq
ment, Inc. v. Welch, 115 Ariz. 206, 564 P.2d 895, (1977)
support of its definition of a collusive agreement. The Court
Mustang noted that pre-trial agreements had been approved
their jurisdiction and stated that disclosure was necessary
uphold the validity of such an agreement. The Court found
agreement in question was not collusive and did not encour
fraud because the agreeing co-defendant maintained a bond-f
adversary posture at trial and the trial was conducted as
would have been without the agreement.

Such is the case with the Foster-Ewing v. David Mac Kelly trial, (Third District Court, 78-1377). The trial was held and the agreement accepted by the Court. Counsel for Kelly appeared and actively cross-examined the witnesses. Documentary evidence was introduced and considered by the Court and personal testimony was given.

Appellant is required to prove by clear and convincing evidence its allegations of collusion, (Universal CIT Credit Corp. v. Sohm, 15 Ut.2d 262, 391 P.2d 293 (1964), a burden it has failed to meet.

C. Appellant had an obligation and an opportunity to defend Kelly.

Appellant states that its refusal in defending stems from Kelly's failure to cooperate in his own defense and that Kelly was not a permissive user of its vehicle. Substantially the same argument can be made with regard to Appellant's failure to cooperate with the defense of its insured. David Mac Kelly was a permissive user of Appellant's vehicles with the meaning of the statute. (U.C.A. §31-41-3(4)). Permission may be expressed or implied and may be established by showing the course of conduct or relationship between parties which signifies acquiescence on the part of insured. Alliance Mutual Casualty Co. v. Hartford

Accident & Indemnity Co., 210 Kan. 767, 504 P.2d 161 (197
Since Kelly was a permissive user of Appellant's vehicle at
time of the accident, Appellant was under the duty to insure,
as Kelly's employer, but as Kelly's insurer. The liability of
insurer is absolute upon the happening of a loss and is
dependent upon a recovery of a judgment against the insured
the making of any payment to the injured person. (Couch
Insurance, 2d 45; 24, Liability of Insurer Under Liability Co
tracts; Viddish v. Hartford Accident & Indemnity Co., 41
Super., 221, 124 A.2d 607, Metcalf v. Hartford Accident & Inde
nity Co., 126 N.W.2d 471 (Nebr., 1964), Coblentz v. Americ
Surety Company of New York, 416 F.2d 1059 (5th, 1969), Guercio
Hertz), supra.

Appellant failed to protect its potential liability
not defending Kelly. Appellant was given every opportunity
appear and defend Kelly and failed and refused to do so.

David Mac Kelly was an employee of Appellant and
permissive user of a vehicle owned and operated by Appella
Appellant had a duty to maintain security by insurance or sel
insurance regarding the operation and use of its motor vehicle
Kelly. Respondents seek to recover the judgment obtained aga
David Mac Kelly for the wrongful death of their child result
from the opration of Appellant's vehicle by David Mac Kelly.

provisions of the Indemnification Act, and all arguments made regarding the employer/employee relation of Appellant and Kelly, including scope of employment, are irrelevant in light of the fact that Kelly was a permissive user of the automobile and Appellant is required by law to provide security, including liability coverage for all damages resulting from the user of that vehicle.

Appellant argues that the provisions of the Governmental Immunity Act are applicable in this case. However, this is not a suit against Salt Lake County pursuant to U.C.A. §63-30-7, nor is it a suit under the Indemnification of the Public Officers and Employees Act, U.C.A. §63-48-1, et seq. This suit derives from the fact that Salt Lake County is acting as an insurer of a vehicle and liable as an insurer and not as an employer or governmental entity. As an insurer, Appellant has a duty to defend Kelly and refused to do so, therefore is bound by the judgment against it.

POINT IV

APPELLANT IS LIABLE FOR INTEREST ON THE JUDGMENT AGAINST KELLY AND FOR ATTORNEY'S FEES AND COSTS.

A. Appellant is self-insurer and obligated to provi benefits customarily provided by insurers offeri similar coverage.

Appellant was found by the lower court to be obligat as a self-insurer for the indemnification of David Mac Kelly a was ordered to pay interest on the $150,000.00 judgment again Kelly. Appellant argues that the liability of insurer for inte est on judgments arrives from policy language and since there no policy of insurance or contract awarding interest, Appella should not have to pay the interest on the judgment again Kelly.

As stated above, Appellant's self-insurance certific substitutes for the equivalent commercial policy and this Co has held that in order to determine the scope of the County self-insurance program, insurance law principles must be consi ered.

The lower court awarded interest on judgment based Respondent's arguments that if Appellant puts itself in the sh of an insurer, he must walk the same course.

In Peterson v. Western Casualty and Surety Company, 19 Ut.2d 26, 425 P.2d 769 (1967), the burden of paying interest on a judgment went to the insurance company because the delay in payment of the judgment is chargeable to the insurance company since it controls the litigation. Appellant had numerous opportunities to settle the instant case and to defend itself in the prior action and did not. Appellant is the insurer of its vehicles and responsible for delaying the settlement of this case, therefore Appellant should pay interest upon the judgment. (See also Security Insurance Company of Hartford v. Houser, 552 P.2d 308 (Colo., 1976).

B. Costs and Fees.

Respondents filed a declaratory action against Appellants as the insurers of the vehicle causing the death of Jeffery Adrian Ewing/Foster. Under U.C.A. §78-33-10 the Court may grant an award of costs that seem equitable and just. Furthermore, the Court in Western Casualty and Surety Co. v. Marchant, 615 P.2d 429 (Utah, 1980) said that costs could be assessed against the party that conducted the litigation in bad faith. Appellant has been unpaorly litigious and has twice appealed the judgment against it. Appellant did not choose to undertake the defense of

David Mac Kelly and protect its own interest, has refused to ... the judgments against it and was justly assessed costs under ... declaratory judgment action.

CONCLUSION

Appellant is the self-insurer of the vehicle driven ... David Mac Kelly. Appellant's self-insurance certificate, issu... under U.C.A. §31-41-5(b) is equivalent to the security that wou... be used to conform to the provisions of §31-41-5(a). The secu... ity used to conform to §31-41-5(a) incorporates the provisions ... the Safety Responsibility Act, which states that an insura... policy used as security under §31-41-5(a) must have certa... minimum limits of insurance coverage in order to satisfy ... proof of financial responsibility provisions in §41-12-1, ... seq. Neither act limits the amount of recovery available to ... who has been injured by a motor vehicle.

Appellant failed to limit its liability by specifica... stating a limit on its application for self-insurance or ... informing its insureds or beneficiaries of any limits. Liabil... not clearly excluded from coverage is presumed to have ... included.

The State Insurance Commission would not have issued a certificate of self-insurance to Appellant if the Commission had known that Appellant did not intend to provide the same level of coverage previously provided by its commercial carrier or that Appellant intended to provide only the immediate loss coverages of the No-Fault Act. The State Insurance Commission applies the same standards to self-insurers as they do to commercial insurers.

Appellant waived its right to deny coverage of its permissive user, David Mac Kelly, by virtue of allowing Kelly to continue to use a vehicle after Appellant had known for a year and a half that Kelly had a drinking problem.

Appellant was correctly held to be the insurer of David Mac Kelly and is bound by the judgment against it as well as interest upon that judgment and costs and legal fees awarded under the Declaratory Judgment Act.

Therefor, the District Court's award to the respondent in the amount of $15,000.00 based on the minimums provided for in the Safety Responsibility Act is in error since the language of the Act sets forth the minimum amount of liability coverage needed to provide security under the No-Fault Act and does not in any manner restrict or limit the amount recoverable in the event of an accident.

Furthermore, the Appellant is bound by the judgme against Kelly in the amount of $150,000.00 and is liable for ... interest from date of judgment as well as costs and attorney fees.

DATED this 26th day of August, 1983.

Respectfully submitted,

KIPP AND CHRISTIAN, P.C.

CARMAN E. KIPP

STEPHEN F. HUTCHINSON
Attorneys for Respondents

CERTIFICATE OF DELIVERY

On this 26 th day of August, 1983, I hereby certify that I have hand-delivered a true and correct copy of the foregoing Brief of Respondents-Cross Appellants, to the following:

Ted Cannon
SALT LAKE COUNTY ATTORNEY
Ralph D. Crockett
DEPUTY COUNTY ATTORNEY
231 East 400 South
Salt Lake City, Utah 84111

Sylvia K. Ford